IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Writ Petition No.2564 of 2004

Dayanand B. Nayak — Petitioner
Vs.
State of Maharashtra & anr. — Respondents

Mr.A.P.Mundargi, Senior Counsel with Mr.S.V. Marwadi for petitioner.

Mr.A.S.Gadkari, APP for State.

CORAM: B.H.MARLAPALLE, J.

Reserved on: July 26, 2007.
Pronounced on: August 09, 2007.

JUDGMENT:

1. This petition under Article 227 of the Constitution impugns the order dated 6/12/2004 passed by the learned Special Judge under the MCOC Act, Mumbai in MCOC Special Case No.4 of 2003. In the said case the present respondent no.2 is the complainant and the petitioner is the accused no.1. By the impugned order the learned Special Judge has directed to issue process against the petitioner - accused no.1 for the offences punishable under Section 3(5) and Section 4 read with Section 24 of the MCOC Act and also under the Prevention of Corruption Act, 1988.

2. The respondent no.2 approached the Designated

Court under the MCOC Act and filed a private complaint which came to be registered as Misc. Application No.255 of 2003 against five accused and he submitted a list of witnesses. On verification of the complaint two witnesses were examined by the learned Special Judge and at that stage the present petitioner approached this Court in Criminal Writ Petition No.1755 of 2003 praying for quashing the proceedings initiated by the complainant before the Special Court and by then the complaint filed by the respondent no.2 came to be registered as MCOC Special Case No.4 of 2003. The said petition was summarily rejected by this Court on 17th December 2003. It was noted in the said order by this Court that accused nos.2 and 3 in MCOC Special Case No.4 of 2003 i.e. Dr.Mrinalini Patil and Shri R.C. Agarwal had already appeared before the Special Court by filing applications on the basis of some newspaper reports and some orders had been passed on the said applications. It was further noted that if the Court decided to issue an order of process, it was bound to take further steps as contemplated under the MCOC Act as well as other procedural law viz. the Criminal Procedure Code. In para 22 of the said order dated 17/12/2003 this Court observed as under:

"It is seen from the record that the complainant has submitted a long list of witnesses and in addition private application / letters seem to have been received by the Special Court. After the complaint has been verified the statement of two witnesses have been recorded on oath and (sic - after) Shri Sandeep Bishnoi submits his investigation report, it may be necessary for the learned Special Judge to limit the number of witnesses for recording statement on oath so as to examine whether a prima facie case has been made out under MCOCA so as to proceed further for passing the order for issuance of process. The court below would certainly exercise its judicial discretion in screening the list of witnesses even when the trial, if any, commences and the record also reveals that the learned Special Judge is aware of the limitations governing his authority under MCOCA and he would take all steps to ensure that the trial, if commences, is taken to its logical conclusion within a reasonable time. If the learned Special Judge finally comes to

the conclusion to pass an order under sec. 204 of the Code, he would apply his judicious mind and exercise the judicial discretion in dealing with the further legal procedure so as to ensure that the same does not open floodgates for abusing the process of law."

3. On 8th March 2004 the learned Special Judge passed the following order:

ORDER

. Sessions Registrar shall produce before the Commissioner of Police Mumbai a set of certified true xerox copies from the original of the following record and proceedings namely

1) Complaint filed by Ketan Tirodkar.

2) Verification statement made by complainant made before this Court.

3) Copies of the statements made by total 9 witnesses examined in support

of the complaint.

4) Copy of the report submitted by A.C.P. Shri Shankar Kamble along with copies of documents submitted along with the report.

5) Copy of the report submitted by D.C.P. Shri Sandeep Bishnoi.

6) All the copies of exhibits and documents received by this Court during the course of investigation.

2. The Commissioner of Police, Mumbai shall after perusal of the documents produced as above before him hear the complainant and/or his advocate if the complainant desires to place some more facts before the Commissioner of Police, Mumbai.

3. Upon hearing and perusing the records as above and after hearing the complainant and/or his advocate, the Commissioner of Police, Mumbai shall unless he decides to

probe the matter further, pass an appropriate reasoned order for either to grant or refuse or withhold statutory sanction as contemplated under section 23(2) of the M.C.O.C. Act, 1999 to prosecute the offenders in the case and shall communicate such reasoned order to this Court preferably on or before 12.4.2004.

4. In the event the Commissioner of Police, Mumbai decide to probe the matter further the result of the investigation ordered by him if any shall be communicated to this court as early as possible along with order passed as indicated above.

5. The complainant shall approach the Commissioner of Police, Mumbai to fix the date of hearing and shall attend hearing along with his advocate before the Commissioner of Police, Mumbai so as to enable him to pass an appropriate reasoned order as indicated above.

6. Even otherwise the Commissioner of Police, Mumbai (in the event the complainant do not approach him to fix date of hearing)

shall fix the same and date of hearing and shall communicate it in writing to the complainant or his advocate with copy of such intimation to this court.

7. The complainant and his advocate to note that non-cooperation by the complainant by non attendance at the hearing fixed before the Commissioner of Police, Mumbai on the dates of hearing so fixed may result into dismissal of the complaint by this court.

8. The case shall appear on board before this court on 12.4.2004 for further order in the enquiry proceedings before this court.

4. Consequent to the above order dated 8/3/2004 the Commissioner of Police, Brihan Mumbai submitted his report to the Special Court in MCOC Special Case No.4 of 2003. In the said report the Commissioner recorded a prima facie finding that the offences under Section 3(1)(ii), 3(2), 3(5) of the MCOC Act read with Section 120-B and Section 387 read with Section 34 of IPC were made out against the following persons:

(a) Ketan Tirodkar - Complainant

(b) R.C. Agarwal - Accused no.3.

(c) Chhota Shakeel - Accused No.4 (Absconding)

(d) Fahim Machmach - Accused No.5 (Absconding)

The Commissioner of Police concluded his report by the following order :

> "Shri Dilip Sawant, ACP Crime Branch, may peruse all the papers sent herewith and on finding all the requirements of MCOC Act being fulfilled, initiate appropriate steps in accordance with the provisions of MCOC Act and proceed to register an offence under MCOC Act. He may then investigate the case personally and thoroughly against these four or any other accused as may transpire during the course of investigation.
>
> On completion of investigation, he may take appropriate action as per the provisions of

MCOC Act for filing the charge sheet before the Hon'ble Court including obtaining prior sanction for prosecution under section 23(2) of MCOC Act."

5. On 7/6/2004 the learned Special Judge passed an order on perusal of the report submitted by the Commissioner of Police and noted that the said report appeared to be inconclusive as further investigation was directed to be undertaken by Shri Dilip Sawant, ACP Crime Branch and decided to await for the enquiry report. It also observed that if the police report did not relate to any of the cases mentioned in the complaint, it would be open for the Court to proceed with the enquiry stayed by it in accordance with the provisions of Cr.P.C. and that the Commissioner of Police had neither granted nor refused the statutory sanction as contemplated under Section 23(2) of the MCOC Act. The learned Judge further sated that the Commissioner of Police may also either himself or through I.O. hear the complainant and his advocate to see that the case must meet its logical end. This order passed on 7/6/2004 has been challenged by the original complainant in Writ Petition No.1228 of 2006 and the same has been clubbed with this petition.

The Enquiry Officer Mr.Dilip Sawant, ACP submitted two interim Reports at Exhibit 32 and Exhibit 33 before the Special Court and in his report at Exhibit 33 dated 16/11/2004 he stated that the complainant who had made allegations against the present petitioner and others had played a fraud on the Court. While the complainant made a grievance about deliberate police inaction to protect the present petitioner and that the Director General of Police, Maharashtra State had not taken any steps to give his comments and objections and Shri Shankar Kamble, ACP was pressurized to stop investigation initiated on the complaint. He, therefore, prayed for issuance of process while opposing the interim report dated 16/11/2004 at Exhibit 33. The final report submitted by Mr.Dilip Sawant finally implicated the complainant along with R.C.Agarwal - accused no.3, Mohamad Fahim Machmach - accused no.5 and one absconding accused as the persons to be tried by the Special Court under the MCOC Act. The report alleged that the complainant along with R.C. Agarwal and Mohd. Fahim Machmach had entered into criminal conspiracy to facilitate illegal activities by or on behalf of the organised crime syndicate headed by Fahim Machmach . They had agreed to do illegal acts of getting the

premises vacated which was possessed by tenant Tejpal Singh and had also committed extortion of one Shrikant Patwardhan. The Commissioner of Police by his order dated 29th November 2004 granted sanction under Section 23(2) of the MCOC Act against these three accused and one absconding accused (original accused no.4). The Special Court, therefore, took cognizance of the case against the complainant (respondent no.2) and others named in the charge-sheet i.e. R.C. Agarwal and Fahim Machmach. The case came to be registered as MCOC Special Case No.11 of 2004. In the final report submitted by Mr.Dilip Sawant, the names of original accused nos.1, 2 and 4 were omitted as no charge-sheet was filed against them.

6. On the basis of the statement of the witnesses recorded, the enquiry report submitted by Mr.Shankar Kamble, ACP and Mr.Sandeep Bishnoi, DCP and the complaint verified by the complainant, the Special Court summarised the accusations against the petitioner as under:

(1) Acquired unlawful pecuniary benefits and bribed Government authorities by using

unlawful pecuniary gains acquired with the help of funds from the organised crime syndicate led by Chhota Shakeel and aided by Fahim Mach Mach.

(2) Said Daya Nayak had falsely implicated one Jameer Kazi and Shakil in cases of extortion with a view to gain or earn Rs.20 lakhs as pecuniary benefit from the organised crime syndicate. It is also alleged that he had favoured an accused in the Magistrate's court though the said accused was involved in serious offence.

(3) That he had aided and abetted fake police encounter on or about 11.1.2003 of one Sadiq Mehetar at the hands of Gujrat police by alleging falsely that he was to eliminate Narendra Modi, Chief Minister of Gujrat.

(4) He had made false accusations against fellow police officer Vijay Salaskar that he is connected to Dawood Ibrahim's gang on account of animosity or personal rivalry in the police force.

(5) Daya Nayak had committed extortion by picking up one Adil Faroq on false charge.

(6) The said Daya Nayak had communicated with Chhota Shakeel to earn unlawful pecuniary gains to enable himself to effect transfers of certain police officers.

(7) Extortions were committed by said Daya Nayak to produce Hindi films in benami manner to glorify himself and for other unlawful uses.

(8) The said Daya Nayak had planned to murder Tejpal Singh and then to extort his widow at the instance of R.C. Agarwal in consideration of huge unlawful pecuniary advantage.

(9) He had promoted private prostitution.

(10) He had arranged appointment of Shri R.S. Sharma as Commissioner of Police through efforts of film actor Jitendra and politician Shri Sharad Pawar.

7. The learned counsel for the petitioner submitted that the Police Commissioner in obedience of the order passed by the Special Court on 8/3/2004 had appointed Mr. Dilip Sawant as the Enquiry Officer and in his final report there was no case made out against the present petitioner and, therefore, there was no case against the petitioner for issuance of process either under the MCOC Act or the Prevention of Corruption Act or for any other offences. In addition enquiry was made with regard to the petitioner's accounts with different Banks and he was found to be not in possession of any unaccountable wealth. The Investigating Officer did not report that the alleged prosecution had anything to do with the activities attributed to the petitioner in the complaint. Based on the report submitted by the I.O. if the Police Commissioner found that the case was made out only against the complainant Agarwal and Fahim Machmach, the said order based on the report had received finality and when the charge-sheet was filed on 29th November 2004 against the four accused, the learned Special Judge took cognizance and the case was numbered as MCOC Special Case No.11 of 2004. From the said

charge-sheet the original accused no.2 and accused no.4 were omitted. After filing of this charge-sheet the private complaint filed by the present respondent no.2 ceased to exist and, therefore, the learned Judge had no jurisdiction to further proceed with the said complaint of the respondent no.2 registered as Special Case No.4 of 2003. Section 210 of Cr.P.C. will have no application to the facts of the present case once the private complaint on which the investigation was ordered culminated into filing of the charge-sheet against the persons named in the sanction order passed by the Commissioner of Police. The complaint filed by the respondent no.2 did not subsist and there was no reason to issue process so as to take cognizance against the petitioner. The petitioner has also reiterated the issue regarding the Special Court's powers to take cognizance on a private complaint filed under the MCOC Act, without there being any sanction granted by the Competent Authority under the said Act. It is further submitted that even if the learned Judge was of the view that the allegations of disproportionate assets to the credit of the petitioner appeared from the enquiry report submitted by the I.O., it was necessary for the learned Judge to call for the

report and ascertain himself regarding the veracity of these allegations, more so when the petitioner is a public servant and it was not permissible for the learned Special Judge to take cognizance for want of sanction under Section 197 of Cr.P.C.

8. So far as the issue of sanction under Section 23(2) of the MCOC Act prior to taking congnizance or issuance of the process is concerned, the same has been answered by the order dated 17th December 2003 when the present petitioner's writ petition came to be rejected and the said view has been upheld by the majority opinion of the Full Bench in the case of Ashok Gyanchand Vohra and ors. vs. State of Maharashtra and anr. **[2006 (3) Mh.L.J. 164]**. Admittedly the matter is presently pending before the Apex Court and the trial before the Special Court in MCOC Special Case No.4 of 2003 and MCOC Special Case No.11 of 2004 has been stayed as at present but the operation of the Full Court's order has not been stayed. Consequently the commencement of the trial in both these cases before the Special Court is subject to the awaited decision of the Supreme Court.

9. The present petitioner cannot rely upon the

report / reports submitted by Mr. Dilip Sawant who was appointed as the I.O. by the Commissioner of Police, as the said Investigating Officer was not called upon to enquire into the allegations made by the complainant against the petitioner. The Enquiry Officer was directed to investigate only against the named four individuals i.e. the complainant, accused no.3, accused no.4 and accused no.5. The names of the petitioner and original accused no.2 were excluded from the ambit of the enquiry that was entrusted by the Commissioner of Police to Mr.Dilip Sawant.

10. Coming to the issue of sanction under Section 197 of Cr.P.C., as raised by the learned counsel for the petitioner, is concerned, it would be apt to refer to the following observations made in the case of Rakesh Kumar Mishra vs. State of Bihar & ors.**[(2006) 1 SCC 557]**:-

> "The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or

purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if it chooses to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant

acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made

him answerable for a charge of dereliction of his official duty: if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case."

. The acts alleged and summarised in the impugned order by the learned Special Judge against the petitioner cannot be by any stretch of imagination termed as those committed in the discharge of his official duty or in respect of any official duty. In the case of Sankaran Moitra vs. Smt. Sadhna Das and anr. **[AIR 2006 SC 1599]**, Hon'ble Shri Justice Thakker, while being a member of the Constitution Bench, in his minority opinion held that, when the question comes up for consideration before a Court of law as to the applicability or otherwise of Section 197 of the Code, it is not only the power but the duty of the Court to apply its mind

to the fact-situation before it and it should ensure that on the one hand, the public servant is protected if the case is covered by Section 197 of the Code and on the other hand, appropriate action would be allowed to be taken if the provision is not attracted and under the guise of his position as public servant, he is trying to take undue advantage.

11. Having regards to the directions given in para 22 of the earlier order dated 17/12/2003, the learned Special Judge was required to take into consideration, (a) the statements of the witnesses that would be recorded before him after screening the list of such witnesses, (b) the investigation report of Shri Shankar Kambale, ACP and (c) the investigation report to be submitted by Shri Sandeep Vishnoi so as to decide the prima facie case made out under the MCOC Act and to proceed further for passing the order of issuance of process. It was further observed that if the learned Special Judge finally comes to the conclusion to pass an order under Section 204 of Cr.P.C., he would apply his judicious mind and exercise the judicial discretion in dealing with the further legal procedure so as to ensure that the same does not open floodgates for abusing the

process of law.

. The order dated 8/3/2004 passed by the learned Special Judge was, therefore, required to be mainly in two parts. First, it was necessary for the learned Special Judge to decide the issue of prima facie case for issuance of process against all or some of the five accused and secondly to forward these names to the Commissioner of Police, Mumbai for sanction under Section 23(2) of the MCOC Act against whom the order of process was issued. The learned Special Judge for the reasons best known to him did not decide the issue of prima facie case as directed by this court and on the basis of the record available before him and as referred to hereinabove. Instead, he directed the Sessions Registrar to produce before the Commissioner a set of certified true copies of the following original record and proceedings:-

(a) Complaint filed by the respondent no.2.

(b) Verification statement made by the complainant before the Special Court.

(c) Copies of the statements made by in all 9 witnesses examined in support of the complaint.

(d) Copy of the report submitted by ACP Shri Shankar Kambale, ACP.

(e) Copy of the report submitted by Shri Sandeep Vishnoi, DCP.

(f) All the copies of exhibits and documents received by the court during the course of investigation.

12. In a way the Special Court abdicated its powers and unwittingly surrendered the mandate of deciding prima facie case to the Commissioner of Police who, in turn, was happy to receive the order dated 8/3/2004 so as to exclude from the scope of his enquiry the names of original accused no.1 and original accused no.2. The Special Court, therefore, fell in gross errors in failing to decide the issue of prima facie case against all or any of the accused based on the documents which were directed to be

forwarded to the Police Commissioner.

. Even in para 3 of the operative part of the order dated 8/3/2004, as reproduced hereinabove, the Special Court gave further options to the Commissioner of Police. At the first instance the Commissioner of Police was to hear the complainant and peruse the record and pass order either to grant or refuse or to withhold statutory sanction as contemplated under Section 23(3) of the MCOC Act so as to prosecute the offenders in the case and secondly there was an option given to the Commissioner of Police to decide to probe the matter further and if he decided to probe the matter further, the issue of statutory sanction under Section 23(2) of the MCOC Act was left uncertain and probably it was contemplated by the Special Court that the said issue of sanction would be decided on the basis of the report of the probe that the Commissioner may order. It need not be repeated that the Special Court was bound by the directions set out by this court in para 22 of its order dated 17/12/2003 and as reproduced hereinabove and for the reasons best known to the learned Special Judge, these directions were not followed while passing the

order dated 8/3/2004. The enquiry directed by the Commissioner of Police, therefore, has no sanctity in law.

13. However, after receiving the report submitted by the Police Commissioner and the interim as well as the final reports submitted by Mr. Dilip Sawant, passed an order on 7/6/2004 and perhaps in its attempt to take corrective steps so as to have the control over the investigations, it gave certain directions in the last para of the order dated 7/6/2004. Finally it passed the impugned order on 6/12/2004 when it realised that the statutory sanction under Section 23(2) of the MCOC Act was granted by the Commissioner of Police vide his order dated 29/11/2004 only against the complainant, accused no.3 and accused no.5 who is one of the absconding accused and it had initially taken cognizance against the complainant and these three accused by registering MCOC Special Case No. 11 of 2004. It proceeded to consider the accusations against accused no.1 in the complaint, the depositions of 9 witnesses, the enquiry report submitted by Shri Shankar Kambale, ACP as well as the report submitted by Shri Sandeep Vishnoi, DCP and

having summarised the accusation against the accused no.1, the Special Court noted that those were, prima facie, of serious nature alleging criminal liability under Section 3(1), 3(2) read with Section 2(1)(a), 3(5) and Section 4 of the MCOC Act as also under Section 24 of the said Act and Sections 166, 193, 201, 381, 302 read with Section 120-B of IPC. The Special Court relied upon the provisions of Section 210(2) of Cr.P.C. so as to hold that complaint case and the case arising out of the police report could be heard together and thus held that the original case filed by the complainant was a complaint case registered as MCOC Spl. Case No.4/03 and MCOC Spl. Case No. 11/04 was based on the police report. The Special Court stated,

> "..Considering the verification statement and statements of witnesses before the court, the complainant may be able to substantiate his accusations if given opportunity to prove them against accused Daya Nayak and Chhota Shakeel. Ofcourse the complainant will have to present his case, bring all the witnesses and adduce entire evidence in the case. I consider it duty of the court to assure conducive and

smooth administration of justice according to law for the complainant is necessary and the court will have to search for the truth particularly when the complaint was lodged long back before he was arrested as an accused in respect of M.C.O.C. Special Case No.11 of 2004, in my opinion not only the confidence of complainant in the administration of justice but also confidence of people in general in the administration of justice exist because a court would always endeavour to search the ultimate truth in the case. Considering the nature of accusations against the accused no.1 hereinwhich are serious accusations punishable under M.C.O.C. Act and the I.P.C., he alongwith the wanted accused will have to be called upon to face the accusations. It cannot be a part of any police officer's duty to indulge into offences such as acquisition of property by means of illegal means such as extortion etc. in connivance with the organised crime syndicate as alleged. I think accused no.1 will have to be called upon alongwith the wanted accused Fahim Mach Mach and Chhota Shakeel in view of the serious

accusations made in the complaint...."

. The Special Court further stated as under,

"....However, considering the statement in the light of allegations made in this complaint and also provisions of the M.C.O.C. Act in particular Section 3(5), Section 4 read with Section 24 of the M.C.O.C. Act and read further with statutory presumption available under the M.C.O.C. Act in Section 22 as also special rule of evidence in Section 17 of the M.C.O.C. Act, the burden is shifted upon the accused in such case to discharge it to the satisfaction of the special court. Section 7 of the M.C.O.C. Act enables the special court to try an accused for any connected offence under any other law which includes offence punishable under the prevention of corruption Act as well. Hence there are grounds to proceed further against Accused No.1 as also against wanted accused Fahim Mach Mach and Chhota Shakeel as also against accused Rameshwar C. Agrawal..."

14. As far as the case of original accused no.2 is concerned, the Special Court left it open to be decided on the basis of the evidence that may be adduced during the trial of both the cases and as per the learned Judge there did not exist sufficient ground to call upon accused no.2 to face the accusation at the moment. During the course of the trial, it shall be open for the complainant, after leading sufficient evidence to prove under Section 319 of Cr.P.C. to implead any additional accused and, therefore, the original accused no.2 could be impleaded on the basis of such evidence during the trial of both the cases. This view taken by the learned Special Judge cannot be faulted with.

15. Even though the Special Court relied upon the provisions of Section 210 of Cr.P.C. for treating MCOC Spl. Case No.4 of 2003 as arising from the complaint filed by the present respondent no.2 and MCOC Spl. Case No. 11 of 2004 as arising out of the police report, in fact, this separation of cases was unwarranted and could not have arisen if the Special Court followed the directions issued by this court in para 22 of its order dated 17/12/2003. Having

received the statutory sanction order dated 30/11/2004 passed by the Commissioner of Police on the basis of the report submitted by Shri Dilip Sawant, the Special Court, as a matter of abundant care, appears to have relied upon the provisions of Section 210 of Cr.P.C. so as to hold that the complaint filed by the respondent no.2 was not closed on registration of MCOC Spl. Case No.11 of 2004. Both the cases, in any case, have to be tried together and this registration of two separate cases does not really make them as de facto separate cases. When it has been held that the investigation by the police did not have sanctity in law, the question of listing a separate case on the basis of the statutory sanction granted by the Commissioner of Police could not arise.

16. By the impugned order dated 6/12/2004 the Special Court issued process against accused no.1, the present petitioner, in the private complaint registered as Special Case No. 4 of 2003. In the case of Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi and ors. **[AIR 1976 SC 1947]**, the Supreme Court stated as under:-

(a) It is true that in coming to a decision as to whether a process should be issued, the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and established of a prima facie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under Section 202 of the Code of Criminal Procedure which culminate into an order under

Section 204 of the Code.

(b) The scope of inquiry under Section 202 of the Code of Criminal Procedure is extremely limited - limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint - (i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact it is well settled that in proceedings under Section 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not.

17. In the instant case from the original record and proceeding called from the Special Court, I have once again perused the complaint submitted by the present respondent no.2, the depositions of 9 witnesses recorded by the Special Court, the

investigation reports submitted by two police officers, namely, Shri Shankar Kambale, ACP and Shri Sandeep Vishnoi, DCP and having regards to the same, the reasons recorded by the learned Special Judge in coming to the conclusion of prima facie case, cannot be termed as perverse or grossly erroneous. The petitioner is not an ordinary member of the public and he is a uniformed officer as a member of the police force and he is being such a member has entitled him to hold an use a pistol, a gun or any other fire arm but in discharge of his official duty or in respect of any such official duty or purporting to be done in the execution of his duty. The power to hold a fire arm and to fire it cannot be used for extraction of money, indulge in illegal deals or underhand dealings with the underworld and by no stretch of imagination the allegations, as summarised in the impugned order in any way be termed as the acts in respect of any official duty or committed in the discharge of such duty. These instances are of serious nature and prima facie amounting to offences triable under the M.C.O.C. Act. The record perused by me makes out a prima facie case for trial against the accused no.1 and, therefore, the impugned order does not suffer from any errors, leave aside the

errors apparent on the face of the record. The impugned order does not call for interference under the supervisory jurisdiction of this court under Article 227 of the Constitution and hence this petition must fail.

18. In the result, this petition is dismissed. Rule stands discharged. Undoubtedly, the commencement of the trial of these two cases i.e. M.C.O.C. Special Case Nos. 4 of 2003 and 11 of 2004 will be subject to the decision awaited from the Supreme Court in the pending appeals arising from the Full Court decision of this court.

(B.H.MARL